D & C LEASING BHD.

v.

NASIB DAYA (S) SDN. BHD. & 2 ORS.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CIVIL SUIT NO. T. (22) 63 OF 1992]
4 MAY 1993

PRACTICE & PROCEDURE: Judgment in default of appearance - Application to set aside - Whether defence on the merits shown.

The plaintiffs claimed for the sum of RM354,966.05 being the rentals and interest due under four Equipment Lease Agreements entered into between the plaintiffs and the first defendant. The plaintiffs took judgment in default upon the first defendants non appearance and the first defendant applied to set aside the said judgment in default. The question which arose was whether the defendant had managed to show a *prima facie* defence.

The first defendants defence was that the plaintiff had failed to mitigate their loss by disposing of the equipment after repossession and that clause 17 of the agreement was a penalty clause and should be struck down as such.

Held:

[1] The proposed defences of the first defendant was not without merit and the first defendant was entitled to have the judgment in default set aside.

[2] The plaintiff is entitled to the costs thrown away because although the first defendant had explained the reason for the default, they were still to be blamed for having allowed judgment in default to be entered.

[Judgment in default and all execution proceedings taken thereunder set aside].

Case referred to:

Credit Corpn. (M) Bhd. v. Bulan Sabit Sdn. Bhd. & Ors. [1989] 1 CLJ 912/[1989] 2 MLJ 127 ***(foll)***

For the plaintiffs - Mirdin Mandin; M/s. Chin, Mirdin & Co.
For the 1st defendants - Paul Y.K. Chin; M/s. Paul Chin & Co.

JUDGMENT

Ian H.C. Chin JC:

The writ herein was issued against the first defendant and two others on 18 September 1992. The writ was on 5 December 1992 sent by registered post and received by the first defendant on 8 December 1992. Judgment in default of appearance was entered on 31 December 1992 against the 1st defendants for the sum of RM354,966.05 together with agreed interest at the rate of 24% per annum from 11 June 1992 to the date of judgment and further statutory interest. The first defendant filed the present application on 1 February 1993 to set aside the said judgment in default of appearance. In support of the application, one Pia Madvig, the managing director of the first defendants company, swore an affidavit on 28 January 1993. This application was opposed by the plaintiffs and for the purpose its branch manager Thu Sin Huat swore an affidavit on 1 March 1993. The matter was first heard on 2 March 1993 where, because of the late production of certain documents, it was adjourned to 6 April 1993 for further argument. After hearing arguments I reserved my ruling till today.

The reasons for allowing judgment in default of appearance to be entered were fully spelt out in paragraph 5 of the said affidavit of Pia Madvig. As the default had been satisfactorily accounted for and since the Counsel for the plaintiffs did not take issue, I would not dwell on this point but would proceed to consider whether the 1st defendants had shown a *prima facie* defence; that is, a defence on the merits.

The plaintiffs claim is for the sum of RM354,966.05 being the rentals and interest due under four "Equipment Lease Agreements" ("lease agreements"), dated respectively, 9 October 1989, 14 October 1989, 24 October 1989 and 24 October 1989, in respect of four lift trucks ("said equipment"). The rentals payable under the respective lease agreements are as follows:

(1) RM101,664.00 payable by 36 equal monthly rentals of RM2,824;
(2) RM101,664.00 payable by 36 equal monthly rentals of RM2,824;

(3) RM83,268.00 payable by 36 equal monthly rentals of RM2,313; and
(4) RM83,268.00 payable by 36 equal monthly rentals of RM2,313.

The relevant part of the statement of claim reads:

1. .....
2. .....
3. .....
4. .....
5. In breach of the agreements, the first defendant defaulted in paying the monthly rentals under the respective agreements and in total there is due and owing from the first defendant inclusive of penalty interest incurred a sum of RM354,966.05 as at 10th June 1992.
6. By reason of the said breach on the part of the first defendant, the first defendant had repudiated the agreements.
7. In consequence of the matters aforesaid, the plaintiff suffered loss and damage.
8. .....
9. .....

And the plaintiff claims against the 1st, 2nd and 3rd defendants jointly and severally:

1. RM354.966.05
2. interest on the aforesaid sum at the rate of 24% per annum from 11 June 1992 until the date of judgment;
3. statutory interest at the rate of 8% per annum from the date of judgment to the date of full payment;
4. .....
5. .....

As the dispute revolves around clauses 17, which are all similar, of the said lease agreements and to better understand the proposed defence of the first defendants which will be referred to later, it is convenient to reproduce the relevant clause 17 of the lease agreements:

17. *Default*

(i) If

(a) the lessee shall default in payment of any of the sums payable under this lease, or
(b) the lessee shall fail to observe or perform any of the provisions of this lease, whether express or implied, or
(c) the lessor shall on any reasonable ground consider itself insecure, or
(d) any insurance policy in respect of the equipment be cancelled or
(e) a winding-up petition shall be filed against the lessee, or
(f) the lessee shall pass a resolution for voluntary winding-up (otherwise than by way of amalgamation or reconstruction) or shall make any arrangement with its creditors, or
(g) distress or execution shall be levied or threatened upon the equipment or upon any of the lessee's property, or
(h) any judgment against the lessee remains unsatisfied for more than fourteen days,
(i) the lessee shall abandon the equipment, or
(j) the lessee intimates to the lessor, whether orally or in writing before the expiry of the lease period set out in item (5) of the schedule hereto that the lessee no longer wishes to continue the lease for whatever reason, then, in any of the said events, the lessor shall be entitled to immediate possession of the equipment and the lessor may, without prejudice to any other rights and remedies the lessor may have under this agreement:

(a) immediately terminate this Lease without notice and resume possession of the Equipment and for this purpose enter upon any land or building on or in which the Equipment is or is believed by the Lessor or its agents to be situated and if the Equipment or any part thereof is affixed to any land or building the Lessor shall be entitled to sever the same therefrom and the Lessee shall be responsible for all damage caused to the land or building by such removal;

Or

(b) by written notice to the Lessor determine and end this Lease and thereupon the Lessee shall no longer be in possession of the Equipment with the Lessor's consent. The Lessor may thereafter resume possession of the Equipment or require the Lessee by the said notice to

deliver up the Equipment to the Lessor at the address of the Lessor stated in this Lease or such other address as the Lessor may specify.

(ii) Upon the early termination of this lease as provided by clause 17(i) hereof the Lessee's liability to the Lessor for the payment of the total lease rentals specified in item (6) of the schedule hereto and for any other money payable under this lease shall not be affected and if the lessor shall succeed in recovering possession of and selling the equipment within one (1) month from the date of such early termination, the Lessee shall, without prejudice to his liability under clause 17(iv) hereof, pay to the Lessor forthwith upon such sale being completed an amount equal to the aggregate of the residual value of the equipment set out in item (1) or (13) (whichever be applicable) of the Schedule hereto plus the unpaid balance of the total lease rentals specified in item (6) of the Schedule hereto plus late charges on any payments overdue under this agreement at the rate specified in item (14) of the Schedule hereto plus any other sums payable under this Agreement less nett proceeds of sale of the equipment. All sums payable by Lessee under this clause shall bear interest at the rate set out in item (14) of the Schedule hereto from the date of demand by the lessor until the date of payment. Upon payment by the lessee of such sums and interest thereon, the lessee shall be released of all liability to the lessor for rent and other moneys under this Agreement and damages for breach of the Agreement

(iii) If for any reason whatsoever possession of the equipment is not obtained by the Lessor within one (1) month after the date of early termination as provided in clause 17 (i) or possession of the equipment being so obtained it is not sold for any reason within the above-mentioned period, the Lessee shall, without prejudice to his liability under clause 17(iv), forthwith upon the expiration of the said period pay to the Lessor an amount equal to the aggregate of the residual value of the equipment specified in item (10) or (13) (whichever be applicable) of the Schedule hereto plus the unpaid balance of the total lease rentals specified in item (6) of the Schedule hereto plus late charges on any payments overdue under this Agreement at the rate specified in item (14) of the Schedule hereto plus all costs and expenses (including all legal expenses on a full indemnity basis) incurred by the Lessor in tracing or retaking possession or attempting to trace, retake possession or sell the equipment plus any other sums payable under this Agreement. All sums payable under this Clause shall bear interest at the rate set out in item (14) of the Schedule hereto from the date of demand by the Lessor until the date of payment. Upon payment by the Lessee of all such sums and interest thereon the Lessee shall be released of all liability to the Lessor for rent and other moneys under this Agreement and damages for breach of the Agreement.

(iv) In the event that the equipment is sold or disposed of for any reason whatsoever within two (2) years of the lease commencement date and the Lessor incurs any balancing charge under paragraph 7 of the Third Schedule to the Income Tax Act 1967 the Lessee shall forthwith indemnify the Lessor against such balancing charge.

The proposed defence of the first defendants can be summarized this way:

(1) at the time of termination of the said lease agreements, the total amount of rentals owing was RM49,500.26 and the plaintiffs are only entitled to sue for RM49,500.26 as liquidated damages and for general damages to be assessed;

(2) there was a failure on the part of the plaintiffs to mitigate their losses in that they have failed to dispose of the said equipment; and

(3) clause 17 is a penalty clause under which the Court cannot grant relief and only damages are recoverable under the Contracts Act.

The facts in this case are not in issue. Upon the failure of the first defendants to pay the rentals under the lease agreements, the said equipment were repossessed sometime in July 1990 and the plaintiffs were unsuccessful in two attempts, once on 23 November 1990 and the other time on 9 March 1992, in disposing of the said equipment. The plaintiffs are still in possession of the said equipment.

The first defendants are admitting that at the very least they are liable to the plaintiffs for

the sum of RM49,500.26 and for such further damages as are actually suffered by the plaintiffs; this is, according to the 1st defendants, because the said clause 17 is a penalty clause and the amount recoverable thereunder should not be allowed. I was referred by Counsel for the first defendants to, *inter alia*, the case of *Credit Corpn. (M) Bhd. v. Bulan Sabit Sdn. Bhd.& Ors*. [1989] 2 MLJ 127 as supporting his contentions. That case concerns a leasing agreement under which RM229,759.84 was payable by 36 instalments and upon default the equipment were repossessed and sold. The plaintiff in that case sued for 35 unpaid instalments. It was held, *inter alia*, that the claim should not be one of liquidated damages but should be for reasonable compensation and that there is a duty to mitigate by disposing of the equipment. It was further held that the clause concerned in the lease agreement was a penalty cause which was oppressive and unconscionable. The Court in the event held that those were triable issues and refused summary judgment. Though the exact words of the clause concerned had not been reproduced, the end result of that clause is not dissimilar to that of clause 17 of the present case. Therefore, there is merit in the proposed defence of the 1st defendants.

The plaintiffs had objected to the said affidavit of Pia Madvig on the ground that she is not a managing director of the first defendants company as she alleged because the return of the first defendant made in 1989 does not disclose her as being a managing director. The short answer to that is, she may not be in 1989 but could very well be in 1993. Therefore, there is no reason for me not to accept her averment on oath that she is a managing director of the first defendants company.

In the premises I set aside the judgment in default of appearance against the first defendants dated 31 December 1992. The first defendants shall within 14 days hereof file their appearance and their defence. All execution proceedings taken under the said judgment in default of appearance are also set aside. The first defendants shall pay the plaintiffs costs thrown away because, though the first defendants had explained the reason for the default, they are still to be blamed for allowing the default judgment to be entered.